IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No: DA 10-0175

PENNY ANN NICHOLS,

Petitioner and Appellant,

v.

THE DEPARTMENT OF JUSTICE,
DRIVER'S LICENSE BUREAU,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court, Missoula County, the Honorable Ed McLean presiding.

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STATEMENT OF THE ISSUES

I. **Does Montana's Implied Consent law, which requires multiple invasive, warrantless breath and blood tests, violate an individual's rights to privacy and to be free from unreasonable searches under the Fourth Amendment of the United States Constitution and Article II, sections 10 and 11 of the Montana Constitution, when the exigency for the warrantless search is extinguished once law enforcement obtains an admissible, measured sample of an individual's blood alcohol content?**

II. **As applied to Nichols, did the Implied Consent law violate her rights to privacy and rights to be free from unreasonable searches and seizures, because she submitted to a P.B.T., which provided the State with an admissible, measured sample of an individual's blood alcohol content, prior to the request for a second breath that resulted in the suspension of her driving privilege?**

STATEMENT OF THE CASE

On June 1, 2009, Appellant Penny Ann Nichols (Nichols) received notice that, pursuant to Montana Code Annotated § 61-2-402 and/or §61-2-409 the Appellee Department of Justice, Motor Vehicle Division (Department), was suspending her driver's license and/or her privilege to drive in Montana.

On June 8, 2009, Nichols filed a Petition To Set Aside Driver's License Suspension, Pursuant to § 61-8-403, MCA, Or In The Alternative, For Declaratory Relief Setting Aside Driver's License Suspension.

After Nichols and the Department briefed the issues, on March 11, 2010, the District Court issued and Opinion and Order denying Nichols Petition and ordering the action dismissed.

Nichols now appeals from that final Opinion and Order.

STATEMENT OF THE FACTS

The parties here, Nichols and the Department of Justice, Driver's License Bureau, stipulated below to the following facts, which constitute the entire factual record of this case:

On June 1, 2009, Missoula County Sheriff's Office (MCSO) Deputy Stineford, and MCSO Reserve Deputy Wiles initiated a traffic stop of a vehicle being operated by Petitioner, Penny Nichols. (Stip. ¶ 1 (July 2, 2009)). After properly identifying herself via a valid Washington State Driver's License, Nichols was asked to perform certain standardized field sobriety tests, and was then asked to submit to a Preliminary Alcohol Screening Test (P.A.S.T. or P.B.T.) at the scene. (Id.)

After agreeing to submit to the test pursuant to the Implied Consent Statute, the test was administered, yielding a specific quantified, measured alcohol concentration reading, which was duly noted by the officer in the official report. Nichols was then arrested and transported to jail for processing. (Id. at ¶ 2).

Once at the Missoula County Detention Center, Nichols was, once again, asked to submit to a breath test. (Id. at ¶ 3). This additional test was requested on an Intoxilyzer 8000, breath testing machine. (Id.)

Nichols declined to provide a second breath sample and asked to speak with counsel. Nichols actions were deemed a refusal under the Implied Consent Statute. (Id. at ¶ 4).

I. This Court reviews a district court's conclusions of law, including constitutional determinations, de novo. "When resolution of an issue involves a question of constitutional law, this Court exercises plenary review of a district court's interpretation of the law." *Montana Shooting Sports Ass., Inc. v. State*, 2010 MT 8, ¶ 12, 355 Mont. 49, ¶ 12, 224 P.3d 1240, ¶ 12.

II. This Court reviews a district court's ruling on a petition to reinstate a driver's license to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Brown v. State*, 2009 MT 64, ¶ 8, 349 Mont. 408, ¶ 8, 203 P.3d 842, ¶ 8.

SUMMARY OF ARGUMENT

The Montana Implied Consent law is unconstitutional, to the extent it provides for multiple invasive, warrantless searches of an individual, even long after the exigency for such evidence is extinguished once the individual has submitted to a test that provided an admissible, measured amount of alcohol in an individual's blood. Specifically, to the extent the Implied Consent law allows law enforcement to request an individual submit to more than one breath or blood test, or lose their privilege to drive, even after the individual has submitted to a bodily fluid test that provided the State with an admissible, measured amount of the individual's blood, very close to time of alleged criminal behavior.

The Implied Consent law implicates an individual's rights to privacy and to be free from unreasonable searches and seizures. Both the right to privacy and the right to be free from unreasonable searches and seizures are fundamental rights. As such, any statute that implicates these rights must survive a strict scrutiny analysis. To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997).

Once an individual has submitted to a bodily fluid test that provides the State with an admissible, measured amount of alcohol present in the person's blood,

there is no longer any compelling state interest to request further tests or extract further samples. The Implied Consent law is therefore unconstitutional to the extent it provides for multiple, invasive and warrantless searches of an individual's breath or blood once the exigency for such evidence has been extinguished by the individual providing an admissible, measured amount of alcohol present in their blood. The Implied Consent law, therefore, should be held unconstitutional to this extent.

Specific to the case here, the action taken against Nichols' privilege to drive was unconstitutional, because once she submitted the P.B.T., which provided the State with an admissible, measured amount of alcohol present in her blood, there was no longer any compelling state interest to gather such evidence. The suspension of her privilege to drive, therefore, should be reversed.

ARGUMENT

I. The Implied Consent law is unconstitutional to the extent it provides for multiple invasive, warrantless searches of an individual's breath and blood, because once the exigency to gather such evidence has been extinguished, there is no compelling state interest to continue to gather such evidence.

Once an individual submits to a bodily fluid test that provides the State with an admissible, measured sample of the alcohol present in an individual's blood, there is no longer any compelling state interest to request further tests or extract further samples. Because the State's compelling state interest is completely satisfied once the individual provides an admissible, measured sample of the alcohol present in an individual's blood, very close to the time of the alleged criminal driving, the Implied Consent law cannot constitutionally justify multiple invasions into an individual's breath or blood. To the extent the Implied Consent law allows for such multiple invasions, even long after the exigency and need for such tests has been extinguished, it is unconstitutional.

Because Implied Consent implicates the rights to privacy and to be free from unreasonable searches and seizures, it must withstand strict scrutiny in order to be constitutionally valid, under both the United States Constitution, as well as the Montana Constitution.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar provision is found in Article II, Section 11of Montana's Constitution, titled Searches and Seizures:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

The Search and Seizure provision of Montana's Constitution is bolstered by the Privacy Provision of Article II, Section 10, titled Right to Privacy:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without a showing of a compelling state interest.

This Court has previously stated that the Montana Constitution's explicit rights against unreasonable searches and seizures and right to privacy provide for more individual rights protection than the United States Constitution, and that it will not be bound by the interpretations of the United States Constitution where it is not required by federal constitutional law. *See, e.g., State v. Sierra*, 214 Mont. 472, 692 P.2d 1273 (1985).

Specifically, Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States – exceeding even that provided by the

federal constitution. *Armstrong v. State*, 296 Mont. 361, 373, 989 P.2d 364, 373 (1999); citing, *State v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992) (citing *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 439, 649 P.2d 1283, 1286 (1982)). This Court recognizes that the right to privacy is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of "excessive governmental interference" in our personal lives. *Id.*

Both the right to privacy and the right to be free from unreasonable searches and seizures are fundamental rights because they are listed in the declaration of rights. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997) (a right listed in the declaration of rights is a fundamental right).

Legislation infringing the exercise of a fundamental right must be reviewed under a "strict-scrutiny analysis". *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. Therefore the legislation must be justified by a "compelling state interest" and "must be narrowly tailored to effectuate *only* that compelling interest." *Id.*, (citing *State v. Siegal*, 281 Mont. 250, 263, 934 P.2d 176, 184, (1997) (emphasis added) (overruled on other grounds in part by *State v. Kuneff*, 291 Mont. 474, 970 P.2d 556 (1998))).

The requirements of the "strict scrutiny" have been stated as follows:

> When a fundamental interest is affected or if a classification is inherently suspect, then the classification must be subjected to strict scrutiny to determine if it is necessary to achieve a compelling state interest. In addition, this test requires that the state establish that there is no less onerous alternative by which its objective may be achieved.

Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo.1980), cert. denied 449 U.S. 824 (1980) (cited with approval by the Montana Supreme Court in *Pfost v. State*, 219 Mont. 206, 217, 713 P.2d 495, 501 (1985)). Thus, a legislatively enacted infringement upon the rights at issue here would require the showing that the infringement is "necessary" to the achievement of a "compelling state interest", and also that there is "no less onerous alternative by which its objective may be achieved." *Id.* The strict scrutiny requirement effectuates the purpose of Article II, § 10, of the Montana State Constitution – i.e., avoidance of "excessive governmental interference."

The Montana State Supreme Court has recognized a compelling state interest in the enforcement of DUI laws. *Hulse v. State Dept. of Justice*, 1998 MT 108, ¶34, 289 Mont. 1, ¶34, 961 P.2d 75, ¶34. (See also, *Petition of Burnham*, 217 Mont. 513, 520, 705 P.2d 603, 608 (Purpose of the Implied Consent statute is to "aid in the battle against drunk driving."); *State v. Christopherson*, 214 Mont. 449, 451, 705 P.2d 121, 123 (1985) (overriding purpose of Implied Consent statute is to encourage a person arrested for driving under the influence of alcohol to submit to a chemical test). It is clear, therefore, that the Implied Consent statute

aids the enforcement of DUI laws in that it allows a mechanism by which the State may obtain evidence of an individual's blood alcohol level to be used in the prosecution of such cases. Further, it allows the State to extract a sample of a person's blood alcohol very close to the time of alleged criminal activity, which is especially helpful because this evidence is ethereal in nature.

"In constitutional terms, the taking of physical evidence, e.g., defendant's breath, is a seizure and unreasonable seizures are prohibited by the Fourth Amendment to the United States Constitution ..." *State v. Newton*, 291 Ore. 788, 636 P.2d 393 (1981). Subjecting a person to a breath test that requires the production of alveolar or "deep lung" breath for chemical analysis implicates concerns about bodily integrity and, therefore, are deemed constitutionally protected searches. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (citing *California v. Trombetta*, 467 U.S. 479, 481 (1984); 1 W. LaFave, *Search and Seizure § 2.6(a)*, p. 463 (1987)). *See also Burnett v. Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986).

These provisions of the U.S. and Montana Constitutions are given substance in the search and seizure provisions of the Montana Code Annotated. Montana Code Annotated §46-5-101 MCA provides:

> A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made:
>
> (1) by the authority of a search warrant; or
>
> (2) in accordance with judicially recognized exceptions to the warrant requirement

Mont. Code Ann. § 46-5-101. There are established exceptions to the warrant requirement where probable cause is otherwise established. One of the exceptions to the warrant requirement is a search conducted with probable cause and under exigent circumstances. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966). Another exception, codifying exigency in DUI cases, and created by statute in the State of Montana, is the Implied Consent law. Mont. Code Ann. §§61-8-402, 61-8-409.

Generally, breath and blood tests administered as part of a DUI investigation are validated by Implied Consent laws, supported by inherent exigency to collect such evidence, as an exception to the warrant requirement. *Schmerber*, 384 U.S. 757; *People v. Superior Court (Hawkins)*, 6 Cal.3d 757, 761, (1972). The constitutional theory is that once the government has probable cause to believe a test will show an illegal alcohol concentration, the warrant requirement is excused by "exigency" -- i.e., the fact that waiting for a warrant would allow the suspect to sober up and the blood alcohol evidence to disappear. *Schmerber*, 384 U.S. 757;

Hawkins, 6 Cal.3d 757; *Skinner*, 489 U.S. 602. This exigency is codified into a warrant exception in Montana by the Implied Consent law.

It is axiomatic that if there is no exigency, or if the exigency is remedied, the warrant requirement is not abated. *See e.g. People v. Fiscalini, discussed below.* Prior to 1997, P.B.T. results were specifically not admissible evidence, and were recognized as being qualitatively different from the result generated on an Intoxilyzer. This distinction was highlighted in the case of *State v. Strizich*, 286 Mont. 1, 952 P.2d 1365 (1997) wherein the Supreme Court stated:

> [T]he [P.B.T.] is intended for use prior to an actual arrest for the limited purpose of "estimating" the alcohol concentration. Subparagraph (2) [of §61-8-409] specifically provides that: "The results of a screening test may be used for determining whether probable cause exists to believe a person has violated 61-8-401, 61-8-406, o 61-8-410." (Citation omitted) There is no suggestion in § 61-8-409, MCA, that the results of a P.B.T. are admissible as substantive evidence to establish a person's guilt. Neither did those who spoke in support of Senate Bill 316 in the 1995 Legislative Session suggest that the new statute providing for preliminary blood testing would produce substantive evidence of a person's guilt. It was only referred to by the statute's proponents as assistance to an investigating officer in the determination of whether to proceed to an arrest.

Strizich, 286 Mont at 11-12, 952 P.2d at 1371. (See also, *Smith v. State*, 1998 MT 94, ¶ 14, 288 Mont. 383, ¶ 14, 958 P.2d 677, ¶ 14 holding "The [P.B.T.] assists the peace officer in determining whether there is probable cause to support an arrest, while the latter can be used as substantive evidence in a criminal prosecution to support a conviction of DUI.")

However, in response to the decision in *Strizich,* the Montana Legislature obliterated that distinction by the 1997 amendments to Montana Code Annotated §61-8-404(1)(b)(I) (1997). These amendments purport to direct the judiciary to admit evidence of a P.B.T. test as substantive evidence at trial. Specifically, MCA § 61-8-404(b) was revised to read, in pertinent part:

> (b) a report of the facts and results of one or more tests of a person's blood or breath is admissible in evidence if:
>
> (i) a breath test or preliminary alcohol screening test was performed by a person certified by the forensic sciences division of the department to administer the test.

Therefore, in accordance with Montana State Law, P.B.T. results are admissible so long as the test is conducted in accordance with the statute. Accordingly, this Court has since ruled that P.B.T. results are admissible with proper foundation. *See, State v. Damon*, 2005 MT 218, ¶ 29, 328 Mont. 276, ¶ 29, 119 P.3d 1194, ¶ 29.

Once the State has an admissible, measured amount of alcohol present in an individual's blood, such as a P.B.T. result, there is no longer any exigency to collect such evidence. Any subsequent test, therefore, cannot be justified by exigency, either as a warrant exception or as the basis for Implied Consent, because there is no longer any compelling state interest to gather such evidence. While this is an issue of first impression for this Court, other courts have concluded the same.

The California Court of Appeals held, for example, that once law enforcement had a valid test, there was no longer any exigency for further warrantless tests. *People v. Fiscalini*, 228 Cal.App.3d 1639 (1991). There, the defendant first gave a urine test, and then the officer demanded and obtained a blood test as well. As the court explained, the first sample was justified by exigency, but it also satisfied that exigency; hence, the second sample was taken without any justifying exigency to excuse the lack of a warrant, and was therefore impermissible. (*Id.*, at 1644-5, citing, *Schmerber*, 384 U.S. 757 (1966) (holding blood sample permissible only because of necessity and exigency); *Winston v. Lee*, 470 U.S. 753 (1985) (holding surgery to recover bullet from defendant impermissible for want of a showing that it was really necessary)).

Similarly here, once the State has an admissible, measured sample of an individual's blood alcohol content, there is no longer any exigency, and therefore no compelling state interest, in continuing to gather such evidence. Once an individual submits to a P.B.T., which provides the State with admissible evidence of their blood alcohol content, the State's interest is completely met, and at a time more temporally related to the alleged criminal driving.

Once the State has the P.B.T. result, there simply cannot be any compelling state interest to continue to gather evidence without a warrant. The Implied Consent law, therefore, is unconstitutional to the extent it provides for multiple

invasive, warrantless searches once the State has, in its possession, a valid and admissible sample of an individual's blood alcohol content.

Although this discussion largely centers upon the application of Montana Supreme Court cases, involving the interpretation of rights under the Montana State Constitution, individual's rights to privacy and to be free from unreasonable and warrantless searches under the less protective Fourth Amendment to the United States Constitution are also violated by the requirement of multiple breath tests. The issue of Implied Consent, in general, in relation to the Fourth Amendment to the United States Constitution and automobile drivers suspected of violating the Driving Under the Influence laws was specifically, and exhaustively, addressed in the Pennsylvania case of *Commonwealth v. Quarles*, 324 A.2d 452, 457-462 (Penn. 1973).

The Pennsylvania Implied Consent law at issue in Quarles was similar to Montana's:

> Any person who operates a motor vehicle . . . in this Commonwealth, shall be deemed to have given his consent to a chemical test of his breath, for the purpose of determining the alcoholic content of his blood: Provided, That the test is administered by qualified personnel and with equipment approved by the secretary at the direction of a police officer having reasonable grounds to believe the person to have been driving while under the influence of intoxicating liquor.

Quarles, 324 A.2d at 457 (citing The Pennsylvania Vehicle Code, §§ 624.1 (Remaining citations omitted).

The Pennsylvania Court first recognized the several governmental interests implicated. Those governmental interests included the identification of "drunken drivers who represent a menace on the highways", the need to "procure evidence that can be used to prosecute" the suspect, and in the drivers license proceedings the additional goal of "denying these drivers permission to use the roads." *Id.*, at 461. This declaration of policy or governmental interest is strikeenly similar to that recognized by this Court. *See Hulse,* ¶34; *Christopherson*, 214 Mont. at 451, 705 P.2d 121at 123, and discussion *supra* at page 11. Conversely, however, the driver "has an interest in being free of unreasonable searches and seizures of his person that may yield evidence that can be introduced against him in a criminal prosecution." *Quarles*, 324 A.2d at 461.The court in *Quarles* balanced the interests involved in favor of the citizen driver as follows:

> On balance, the driver's interests outweigh those of the Commonwealth. The searches and seizures conducted under the Implied Consent law involve the person, not papers or effects. Intrusions that involve the person should be strictly limited and permissible only upon compliance with the strict standards of the Fourth Amendment. If we found Implied Consent here those standards would be totally irrelevant. A defendant in a criminal prosecution has much at stake -- his reputation, his continued capacity to work, and most important, his freedom. The rights provided him by the Fourth Amendment are most important when the stakes are so high. Finally, it must be noted that the Commonwealth is not totally disabled from procuring evidence of intoxication by reliance on the traditional exceptions to the warrant requirements of the Fourth Amendment. [citation omitted] It is hard to find the Commonwealth's condition reasonably necessary when alternative means to procure the same evidence which are in accord with established doctrine are available.

Quarles, 324 A.2d 452, 461-462.

Applied to the State of Montana, the *Quarles* Court's holding would read as follows:

> It is hard to find the State of Montana's condition reasonably necessary when alternative means to procure the same evidence which are in accord with established doctrine are available.

In other words, in balancing the state interest involved, the State of Montana cannot justify the condition of multiple intrusions permitted by the statutes as being reasonably necessary when the same evidence may be procured in accordance with the first intrusion.

In examining the exact issue presented here, the Pennsylvania Supreme Court has also held that requests for multiple tests are unconstitutional and cannot be justified under the statute absent a separate justified need for additional tests. *Commonwealth v. McFarren*, 514 Pa. 411, 417-18 (1987). In that case, the defendant was arrested for DUI and was asked to take a breath test, which he did. It is apparent that the breath test yielded a result. After the first breath test, the police requested a second breath test, to which the defendant requested to speak to an attorney. The officers treated his requests as a refusal and his license was suspended under the Implied Consent law.

The Pennsylvania Supreme Court, in deciding whether the police's request for a second breath test was constitutional and valid, stated that Art. I, sec. 8 of the

Pennsylvania Constitution, which mirrors the 4th amendment to the U.S. Constitution and Art. II, sec 11 of the Montana Constitution, required that **once the necessity of the Implied Consent statute had been met by a breath test, any further breath test must be shown to be "reasonable."** *Id.* (emphasis added). To hold otherwise, the Court went on to say, "would subject an individual to 'unreasonable searches and seizures' in violation" of the Pennsylvania Constitutional section nearly identical to Montana's. *Id.*

The Court in *McFarren* specifically warned of the fallacy inherent in subjecting an individual to a second test for alcohol "solely to enhance the evidence and guarantee a conviction". In fact, the Court explicitly found such a position is "not reasonable" under the right to be free from unreasonable searches and seizures. *Id.*

This is precisely the fallacy that the District Court employed in its holding by stating:

> If nothing else, *Damon* demonstratives [sic] the difficulty the State faces in proving a particular PAST is sufficiently reliable to be admissible in trial as substantive evidence of alcohol level that exceeds the limit for driving on Montana's highways and streets. Therefore the Court concludes that the Petitioner's constitutional challenge to MCA §§ 61-8-402, 403, and 409, in the context of this civil action for reinstatement of her seized driver's license for her refusal to take the Intoxilyzer 8000 test at the Missoula County Detention Center, after she had already submitted to the Preliminary Alcohol Screening Test (PAST or PBT) at the scene of her arrest, is without merit.

(Opinion & Order, March 11, 2010, pg. 6). Although it is tempting to allow multiple intrusions into an individual's body to ease the burden on the State, or to make it easier to convict those accused of DUI crimes, the Fourth Amendment and Article II, sections 10-11 simply do not allow it. Once the exigency, and therefore the need, for the warrantless search is met, there is no longer any compelling state interest to justify multiple invasive, warrantless searches.

The State has no justification for continued, invasive, warrantless searches, once an individual submits to a P.B.T. that provides the State with an admissible, measured sample of an individual's blood alcohol content, very close to the time of driving. To the extent the Implied Consent law allows multiple, warrantless searches for blood alcohol, after an individual has submitted to a P.B.T., it violates the individual's rights to privacy and to be free from unreasonable searches and seizures. For the forgoing reasons, any request for multiple, warrantless bodily fluid tests, when the State has already obtained an admissible sample through a P.B.T., is unreasonable, in violation of the Fourth Amendment and Article II, sections 10-11. To the extent Montana's Implied Consent law allows for multiple tests in these circumstances, it is unconstitutional under those same constitutional provisions, and this Court should hold as such.

II. The suspension of Nichols' privilege to drive violated her rights to privacy and to be from unreasonable searches and seizures because once she submitted to a P.B.T. that provided the State with an admissible, measured sample of an her blood alcohol content, there was

no longer any compelling state interest to request, under Implied Consent, that she submit to a second invasive, warrantless search of her breath.

The suspension of Nichol's privilege to drive under the Implied Consent law was unconstitutional. Pursuant to the Implied Consent law, Nichols submitted to a P.B.T. that provided law enforcement with a measured amount of alcohol contained in her blood at a time very close to the time of driving. Officers subsequently requested, again pursuant to the Implied Consent law, Nichols again submit to another, **second**, breath test. That request violated Nichols' rights to privacy and to be free from unreasonable searches under both the Fourth amendment to the United States Constitution and Article II, sections 10 and 11 of the Montana Constitution, as did the subsequent suspension of her privilege to drive. Once Nichols submitted to the P.B.T., there was no longer any exigency, and therefore no compelling state interest, to justify another warrantless search. Montana's Implied Consent law cannot, therefore, justify the second invasive, warrantless search request. As such, the suspension of Nichols' driving privilege was unconstitutional.

As shown above, in Section I, once an individual submits to a bodily fluid test that provides the State with an admissible, measured sample of their blood alcohol content, there can no longer be any compelling state interest in requesting further tests and extracting further samples. Once the exigency to collect evidence

of an individual's blood alcohol content is extinguished, through the individual submitting to a bodily fluid test that provides the State with an admissible, measured sample of their blood alcohol content, there can no longer be any compelling state interest in extracting further samples from an individual.

For example, in a situation eerily similar to the case presented here, the Pennsylvania Supreme Court held that once law enforcement has a valid test, any further tests needed additional justification beyond the Implied Consent law. *McFarren*, 514 Pa. at 417-18. In that case, the defendant was arrested for DUI and was asked to take a breath test, which he did. It is apparent that the breath test yielded a result. After the first breath test, the police requested a second breath test, to which the defendant requested to speak to an attorney. The officers treated his requests as a refusal and his license was suspended under the Implied Consent law.

In addressing whether the request for a second breath test was constitutionally valid, the Pennsylvania Supreme Court stated that Art. I, sec. 8 of the Pennsylvania, which mirrors the 4th amendment to the U.S. Constitution and Art. II, sec 11 of the Montana Constitution, required that **once the necessity of the Implied Consent statute had been met by a breath test, any further breath test must be shown to be "reasonable."** *Id.* (emphasis added). To hold otherwise, the Court went on to say, "would subject an individual to 'unreasonable searches and

seizures' in violation" of the individual's right to be free from unreasonable searches and seizures. *Id.* The request for a second test there was unreasonable once there was no longer any necessity for the test.

The exact same result should be reached here. There was no compelling state interest to gather evidence of Nichols' blood alcohol once she submitted to the P.B.T., which provided law enforcement with an admissible, measured amount of alcohol in her blood, and, at more temporally related time to the driving in question. The compelling interest was met when the exigency is extinguished.

There is no factual dispute in this case that Nichols submitted to a P.B.T. at the location she was stopped. (Id., ¶ 2) There is also no dispute that the P.B.T. administered to Nichols registered a specified reading of her alcohol concentration at that time. (Id.) Nor can there be any question that, subject to proper foundation, the evidence from the P.B.T. would be available for use at trial. *See, State v. Damon*, 2005 MT 218, ¶ 29, 328 Mont. 276, ¶ 29, 119 P.3d 1194, ¶ 29.

Because Nichols submitted to the P.B.T., which provided the State with an admissible, measured amount of alcohol present in Nichols' blood, there was no longer any exigency, and therefore no compelling state interest, to perform a second invasive, warrantless search.

Here, the "overriding purpose" of encouraging a person arrested for driving under the influence of alcohol to submit to a chemical test for presence and level of

alcohol to "aid in the battle against drunk driving" is given effect by a single test – the P.B.T. A test which is admissible, subject to proper evidential foundation. It is particularly more difficult to justify the second, and later intrusion, where the test procured in the first instance pursuant to Montana Code Annotated §61-8-409 (the P.B.T.) is temporally more reasonably representative of the issue in dispute – i.e., impairment at the time of driving.

Therefore, the fundamental purpose for the "exigency" ordinarily authorizing warrantless searches for breath alcohol has been extinguished by Nichols's providing the P.B.T. sample. The evidence has already been preserved at a more relevant time, i.e., closer in proximity to the time of the alleged criminal conduct of driving while allegedly being under the influence of alcohol.

The fundamental constitutional infirmity of the statutes as applied to Nichols is that it is not "necessary" for the State to engage in multiple invasions of the right of privacy in order to obtain the evidence sought. The first search of Nichols to obtain the P.B.T. reading extinguishes that necessity. Once Nichols submitted to the P.B.T., the State had, in its possession, a measured, admissible sample of the alcohol present in her blood, and, at a time close to the alleged criminal driving. Moreover, there is a statutorily defined alternative to obtaining the Intoxilyzer test by the amendments to Montana Code Annotated §61-8-409, together with §61-8-404, purporting to make the results of the P.B.T. "admissible" in a DUI

prosecution. Finally, this Court has held such results to be admissible. *Damon*, ¶ 29.

The government discharged and terminated its "exigent" need for a test by obtaining the P.B.T. result for use at trial. Since the P.B.T. satisfies the government's need to preserve evidence for use at trial, the government has no compelling state interest to utilize the Implied Consent law, and fail to obtain a warrant before demanding a second test from Nichols, or for subsequently suspending her privilege to drive for refusing to submit to the second, warrantless search.

The Implied Consent law as applied to Nichols here was an unreasonable, and unconstitutional, exercise of governmental power because there was no longer any compelling state interest to gather evidence of her blood alcohol content once she submitted to the P.B.T., which provided the state with an admissible, measured sample of her blood alcohol content, very close to the time of driving. The suspension of her driving privileges under Implied Consent was likewise illegal and unconstitutional. For the foregoing reasons, Nichols requests this Court reverse the District Court and order that her driving privileges be reinstated.

CONCLUSION

Although there is a clear compelling state interest in enforcing DUI laws, that interest is completely and wholly met once an individual provides law enforcement with an admissible, measured sample of their blood alcohol content in the form of a P.B.T. The P.B.T. completely meets the State's interest, as it preserves evidence of an individual's blood alcohol content, at a time very close to the time of alleged criminal activity, and is available for use at a criminal trial. Once an individual submits to a P.B.T. there is no longer any compelling state interest to continue to gather evidence of an individual's blood alcohol content without a warrant.

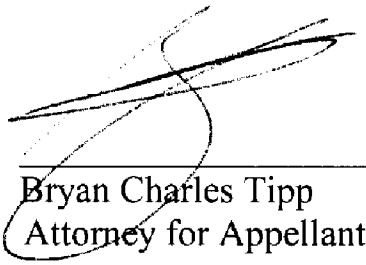
The Implied Consent law, to the extent it justifies multiple invasive, warrantless searches, even after there is no compelling state interest to gather such evidence, is unconstitutional, because it fails the strict scrutiny test.

The action taken against Nichol's privilege to drive is also unconstitutional, because once she submitted to the P.B.T., there was no longer any compelling state interest in requesting more tests or extracting more samples.

For these reasons, Nichols requests this Court declare the Implied Consent unconstitutional, to the extent it allows for multiple invasive, warrantless searches, even long after the need to gather such evidence has been met. Further, because Nichols provided a P.B.T., the suspension of her driving privilege was

unconstitutional and she requests this Court reverse the District Court and order her driving privilege be reinstated.

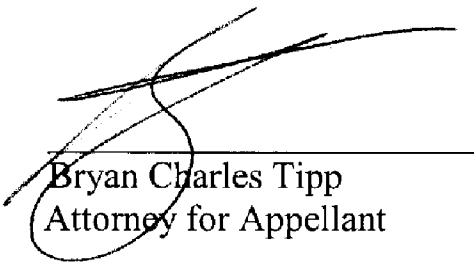
DATED this 16th day of July, 2010.



Bryan Charles Tipp
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text of fourteen (14) points; is double spaced; and the word count calculated by Word 2007 for Windows is not more than 10,000 words, not averaging more that 280 words per page, excluding the cover page, table of contents, table of authorities, certificate of compliance, certificate of mailing and appendix.



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CERTIFICATE OF MAILING

I hereby certify that I caused a true copy of the foregoing document to be mailed to the following person(s), at the address(es) shown, by placing a copy of the same in the United States Mail at Missoula, Montana, in an envelope with first class postage prepaid, this 16th day of July, 2010.

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